

**No. PD-0947-16**

**IN THE COURT OF CRIMINAL APPEALS  
OF TEXAS**

FILED  
COURT OF CRIMINAL APPEALS  
11/14/2016  
ABEL ACOSTA, CLERK

**JUSTIN TIRRELL WILLIAMS**  
*Petitioner*

**v.**

**THE STATE OF TEXAS**  
*Respondent*

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On Petition for Discretionary Review from the First Court of Appeals in  
No. 01-15-00871-CR affirming the conviction in Cause Number 1387897  
From the 209th District Court of Harris County, Texas

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**BRIEF FOR PETITIONER**

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## STATEMENT OF THE CASE

This case involves three separate criminal charges arising out of a single incident that were tried together before a jury. In cause number 1387897, Mr. Williams was convicted of aggravated robbery and sentenced to 40 years in prison and a \$10,000 fine.<sup>1</sup> In cause number 1387898, the trial court's judgment shows Mr. Williams to have once again been convicted of aggravated robbery.<sup>2</sup> He was sentenced to imprisonment for 60 years and a \$10,000 fine. (2 C.R. at 98). In cause number 1387899, Mr. Williams was convicted of aggravated sexual assault and sentenced to 99 years in prison and a \$10,000 fine.<sup>3</sup> The Court ordered that the three sentences run concurrently and that all three sentences be executed.<sup>4</sup> The jury assessed the punishment in all three causes.<sup>5</sup> Mr. Williams filed a timely notice of appeal in each cause.<sup>6</sup> But this petition to the Court of Criminal Appeals involves only Cause Number 1387897 (Appeal No. 01-15-00871-CR).

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<sup>1</sup> 1 C.R. at 126. The clerk's record for this cause number is designated as "1 C.R." The corresponding appellate court cause number is 01-15-00871-CR.

<sup>2</sup> 2 C.R. at 98. The clerk's record for this cause number is designated as "2 C.R." The corresponding appellate court cause number is 01-15-00872-CR. The judgment in this cause number lists the "offense for which defendant convicted" as aggravated robbery. 2 C.R. at 98. However, the listing of the offense of aggravated robbery was a mistake. The jury actually returned a verdict finding the defendant guilty of aggravated kidnapping (not aggravated robbery). 2 C.R. at 95. This finding was consistent with the indictment charging the defendant with aggravated kidnapping. 2 C.R. at 10. The finding was also consistent with the trial court's charge to the jury stating that the defendant stood charged with aggravated kidnapping. 2 C.R. at 77. The Court of Appeals reformed the judgment on appeal to reflect that the judgment in Cause No. 1387898 was for aggravated kidnapping. *Williams v. State*, 495 S.W.3d 583, 588 (Tex. App.—Houston [1<sup>st</sup> Dist.] August 4, 2016, pet. granted).

<sup>3</sup> 3 C.R. at 90. The clerk's record for this cause number is designated as "3 C.R." The corresponding appellate court cause number is 01-15-00873-CR.

<sup>4</sup> 1 C.R. at 126; 2 C.R. at 98; 3 C.R. at 94.

<sup>5</sup> 1 C.R. at 126; 2 C.R. at 98; 3 C.R. at 90.

<sup>6</sup> 1 C.R. at 102; 2 C.R. at 129; 3 C.R. at 94.

## STATEMENT OF PROCEDURAL HISTORY

The First Court of Appeals affirmed Mr. Williams' conviction in a published opinion released on July 12, 2016. But the judgment of conviction was modified to reflect some changes to the fines and court costs assessed. On July 18, 2016, Mr. Williams filed a motion for rehearing seeking slight changes to the opinion regarding the assessment of fines and court costs. The Court of Appeals granted the motion for rehearing and issued a new opinion on August 4, 2016.<sup>7</sup> Mr. Williams did not file any further motion for rehearing in regard to the opinion on rehearing.

Mr. Williams filed a petition for discretionary review (PDR) on August 17, 2016. The PDR concerned the Court of Appeals' affirmation of the trial court's imposition of a \$5.00 "release" fee. This Court granted the PDR on November 2, 2016. Under Texas Rule of Appellate Procedure 70.1, the petitioner must file a brief within 30 days after review is granted.<sup>8</sup> Accordingly, Mr. Williams' brief is due in this Court by December 2, 2016.

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<sup>7</sup> *Williams v. State*, 495 S.W.3d 583 (Tex. App.—Houston [1<sup>st</sup> Dist.] pet. granted).

<sup>8</sup> Tex. R. App. P. 70.1.

## **GROUND OF REVIEW**

### **FIRST GROUND OF REVIEW**

This ground of review assumes that a separate \$5 court cost for releasing a defendant from jail is appropriate. The Court of Appeals upheld the trial court's assessment of a \$5 cost for "release" because the defendant was "released" to prison. Did the Court of Appeals err in affirming the assessment of a cost for "release" when the defendant was "released" to prison?

### **SECOND GROUND OF REVIEW**

This ground of review assumes that a \$5 cost for releasing a defendant to prison is appropriate. Costs for peace officer services are to be assessed for services performed "in the case." The Court of Appeals upheld the trial court's assessment of a \$5 cost even though the sheriff released Mr. Williams to prison following trial. Did the Court of Appeals err in upholding the cost assessment because the release occurred after the trial concluded?

### **THIRD GROUND OF REVIEW**

This ground of review assumes a \$5 cost for releasing a defendant to prison is appropriate even though the release occurs after trial. The Court of Appeals upheld the \$5 cost's assessment even though there had been no release at the time the bill of costs was prepared. Did the court of appeals err in affirming the assessment of a cost for which a service had not yet been performed?

## STATEMENT OF FACTS RELATIVE TO GROUNDS OF REVIEW

Justin Williams, Petitioner, was convicted of three separate felony offenses in the trial court.<sup>9</sup> A \$5 court cost for “release” was imposed against Mr. Williams in each of the three cases.<sup>10</sup> On appeal, Mr. Williams argued that court costs should only have been assessed in one of the three convictions.<sup>11</sup> The Court of Appeals agreed and deleted the \$5 court cost for “release” from two of the three judgments.<sup>12</sup>

Mr. Williams also argued on appeal that the \$5 cost for “release” should not have been assessed in any of the judgments.<sup>13</sup> The Court of Appeals did not agree and upheld the assessment of the \$5 release fee in the first of the three judgments.<sup>14</sup>

The fee for release was assessed only in trial court Cause Number 1387897 (Court of Appeals Cause Number 01-15-00871-CR). Accordingly, Mr. Williams’ petition to this Court concerns only the conviction in the case identified by these cause numbers.

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<sup>9</sup> 1 C.R. at 126; 2 C.R. at 98; 3 C.R. at 90.

<sup>10</sup> 1 C.R. at 128; 2 C.R. at 100; 3 C.R. at 92.

<sup>11</sup> Brief for Appellant at 33-36.

<sup>12</sup> *Williams v. State*, 495 S.W.3d at 589-90.

<sup>13</sup> Brief for Appellant at 46-48.

<sup>14</sup> *Williams v. State*, 495 S.W. at 591-92.

## SUMMARY OF THE ARGUMENT

The \$5 fee for “release” should not have been assessed upon the conviction of Petitioner Justin Williams. The First Court of Appeals erred in upholding the assessment of the fee for two reasons.

First, Mr. Williams was never released from custody after his initial arrest. Therefore, there was never any release for which the \$5 fee could have properly been assessed. The Court of Appeals’ holding that Mr. Williams was released upon being delivered to prison is inconsistent with the ordinary meaning of the word “release.” (This argument is advanced in Ground of Review One.)

Second, even if Mr. Williams was “released,” there had been no release at the time the bill of costs assessing the \$5 fee was produced. The bill of costs is dated October 2, 2015 while the “release” to prison occurred over one month later on November 5, 2015. “An officer may not impose a cost for a service not performed . . . .”<sup>15</sup> Thus, at the time the \$5 fee was assessed, no service had been performed to warrant imposition of the fee. The assessment of the fee was improper. (This argument is advanced in Ground of Review Three.)

Originally, Petitioner’s counsel believed Ground of Review Two supported his argument that the Court of Appeals erred in upholding the \$5 release fee’s assessment.

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<sup>15</sup> Tex. Code Crim. Proc. Ann. art. 103.002 (West 2006).

Upon further study of this issue, Petitioner's counsel has been convinced otherwise.

This issue is discussed in detail under Ground of Review Two.

## ARGUMENT

### FIRST GROUND OF REVIEW

**This ground of review assumes that a separate \$5 court cost for releasing a defendant from jail is appropriate. The Court of Appeals upheld the trial court’s assessment of a \$5 cost for “release” because the defendant was “released” to prison. Did the Court of Appeals err in affirming the assessment of a cost for “release” when the defendant was “released” to prison?**

Yes.

Article 102.011 of the Code of Criminal Procedure is entitled “Fees for Services of Peace Officers.”<sup>16</sup> Subsection (a) of the statute begins with the following language:

A defendant convicted of a felony or misdemeanor shall pay the following fees for services performed in the case by a peace officer:<sup>17</sup>

Eight different fees are then listed.<sup>18</sup> The sixth of the eight fees is described in its entirety as follows: “\$5 for commitment or release.”<sup>19</sup> The statute itself provides no further elaboration. However, the Fourteenth Court of Appeals has interpreted this language to mean a commitment to jail and a release from jail.<sup>20</sup>

In the current case, the Court of Appeals said that a release to prison constitutes a release from jail for purposes of Article 102.011(a)(6).<sup>21</sup> The Court declared:

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<sup>16</sup> Tex. Code Crim. Proc. Ann. art. 102.011 (West Supp. 2015).

<sup>17</sup> Tex. Code Crim. Proc. Ann. art. 102.011(a) (West Supp. 2015).

<sup>18</sup> *Id.*

<sup>19</sup> Tex. Code Crim. Proc. Ann. art. 102.011(a)(6) (West Supp. 2015).

<sup>20</sup> See *Adams v. State*, 431 S.W.3d 832, 838 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2014, no pet.) (“appellant was committed or released two times”).

<sup>21</sup> *Williams v. State*, 495 S.W.3d at 591-92.

[Appellant] argues that because he remained in jail from the date of his arrest until the date of his conviction, he was never released from jail. Therefore, he argues, he should not have been assessed a \$5 fee for release.

Appellant's argument is without merit. The judgments of conviction in all three cases ordered the Harris County Sheriff "to take, safely escort, and deliver Defendant to the Director, Institutional Division, TDCJ." The judgment also ordered that the defendant be confined in the "Institutional Division, TDCJ," not in the county jail. Thus, the Harris County Sheriff was required to release appellant into the custody of the prison system. Appellant was properly assessed a \$5 release fee.<sup>22</sup>

The Court of Appeals' opinion is not totally unreasonable. But there is a legitimate question as to whether releasing a defendant to the prison system is really a release at all.<sup>23</sup> The Court of Appeals of Appeals cited no authority for its conclusion that a sheriff's release of a defendant to a prison constitutes a release. No Texas appellate court appears to have ever squarely addressed this issue prior to the First Court of Appeals' opinion.<sup>24</sup> The issue is now directly presented to this Court.

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<sup>22</sup> *Id.*

<sup>23</sup> This question comes up with some frequency. Many arrested defendants are not released on bond and thus they spend all of their time between arrest and trial in jail. If such defendants are convicted of a felony, they are never released from jail into society at large. Instead, these defendants go directly to prison. The question of whether these defendants have been "released" arises in all of these situations. Petitioner's counsel is unaware of any recent Harris County case involving these kinds of facts in which the \$5 release fee was not assessed.

<sup>24</sup> In *Love v. State*, No. 03-15-00462-CR, 2016 WL 1183676 (Tex. App.—Austin March 22, 2016, no pet.) (mem. op., not designated for publication), the appellant did raise this issue. The appellant argued that the release fee was unauthorized because he "was not released on bail." *Id.* The Court of Appeals did not need to address the issue in deciding the appeal. Accordingly, the issue was not directly addressed.

The Code Construction Act tells us that words are to be “read in context and construed according to the rules of grammar and common usage.”<sup>25</sup> Accordingly, to determine the meaning of the word “release,” we should examine the manner in which the word is commonly used.

The first definition of the verb “release” by Webster’s Dictionary is “to set free from restraint, confinement or servitude.”<sup>26</sup> The initial definition of the verb “release” by Dictionary.Com is “to free from confinement, bondage, obligation, pain, etc.”<sup>27</sup> The definition of the verb “release” by the Oxford Living Dictionary is similar – “allow or enable to escape from confinement; set free.”<sup>28</sup>

Synonyms for the word “release” listed by the Oxford Living Dictionary are “free, set free, let go, allow to leave, let loose, set loose, turn loose, let out, liberate, set

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In three separate cases authored by Justice Massengale, the First Court of Appeals described the \$5.00 release fee as “a release fee on each case including release to the Texas Department of Criminal Justice.” *Smith v. State*, 439 S.W.3d 451, 462 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2016, no pet.); *Roland v. State*, No. 01-12-00687-CR, 2014 WL 2809772 (Tex. App.—Houston [1<sup>st</sup> Dist.] June 19, 2014, pet. ref’d) (mem. op., not designated for publication); *Garcia v. State*, Nos. 01-12-00715-CR, 01-12-00716-CR, 2014 WL 1494274 (Tex. App.—Houston [1<sup>st</sup> Dist.] April 15, 2014, no pet.) (mem. op., not designated for publication). All three cases cited the “commitment and release” language of Article 102.011(a)(6) as authority for this description. *Id.* The meaning of the term “release” was not at issue in any of the appeals. There is no apparent reason as to why the First Court of Appeals included this gratuitous language. In the current case, the First Court of Appeals did not cite *Smith*, *Roland* or *Garcia* as authority for its holding.

<sup>25</sup> Tex. Gov’t Code Ann. § 311.011(a) (West 2013).

<sup>26</sup> See Merriam Webster’s Collegiate Dictionary 987 (10<sup>th</sup> ed. 1999).

<sup>27</sup> See online definition at [www.dictionary.com/browse/release?s=t](http://www.dictionary.com/browse/release?s=t). (Page last visited on November 10, 2016).

<sup>28</sup> See online definition at <https://en.oxforddictionaries.com/definition/release> (Page last visited on November 10, 2016).

at liberty, deliver, rescue, ransom, and emancipate.”<sup>29</sup> The foregoing definitions and synonyms all envision a person being set free. The idea of a person being released from jail – typically on bond – is consistent with these definitions and synonyms.

But simply moving a person from a county jail to a state prison is inconsistent with the ordinary understanding of the term “release.” A person who is in jail and is being sent to prison would not tell his family members he was being released. This is because being released connotes being freed from confinement. A person on his way to prison is most definitely not being released from confinement.

This seems especially to be the case in light of the phrase “commitment and release.”<sup>30</sup> Unlike the term “release,” the term commitment is specifically defined in the Code of Criminal Procedure. “A ‘commitment’ is an order signed by the proper magistrate directing a sheriff to receive and place in jail the person so committed.”<sup>31</sup> When a person is committed, he is taken out of regular society and placed in custody. A release would logically mean just the opposite – to be taken out of custody and placed back into the community.

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<sup>29</sup> *Id.*

<sup>30</sup> See Tex. Code Crim. Proc. Ann. art. 102.011(a)(6) (West Supp. 2015).

<sup>31</sup> Tex. Code Crim. Proc. Ann. art. 16.20 (West 2005).

Consideration of a common non-legal situation in which the term “release” is used may be helpful. The situation comes from the world of fishing. The name of the particular fishing practice is “catch and release” which Wikipedia defines as follows:

Catch and release is a practice within recreational fishing intended as a technique of conservation. After capture, the fish are unhooked and returned to the water.<sup>32</sup>

In the context of catching and releasing fish, to release a fish means to return the fish to the water from whence it came. No one would say that turning the fish over to a fish packer for someone’s eventual meal would be releasing the fish. Similarly, to release a person from jail means to return the person to the free population from which the person came. To say that sending the person to prison is to release him or her strains the meaning of the word.

The Court of Appeals’ declaration that the Harris County Sheriff “release[d]” the appellant “into the possession of the prison system”<sup>33</sup> distorts the English language. The ordinary meaning of the word “release” does not connote a jail handing off a defendant to a prison. Significantly, the Texas statutes themselves do not refer to a movement of a defendant from jail to prison upon conviction as a “release.” Rather, the term used to describe this movement by Article 42.09 of the Code of Criminal

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<sup>32</sup> See online definition at [https://en.wikipedia.org/wiki/Catch\\_and\\_release](https://en.wikipedia.org/wiki/Catch_and_release). (Page last visited on November 10, 2016.)

<sup>33</sup> *Williams v. State*, 495 S.W.3d at 592.

Procedure is a “transfer.”<sup>34</sup> The word “transfer” (or its derivation) appears 15 times in Article 42.09. Each reference is to the transfer of an inmate from jail to the Texas Department of Criminal Justice (TDCJ).

Other Texas statutes use the term “release” to mean a release from custody. For example, Article 15.17(d) of the Code of Criminal Procedure says:

If a magistrate determines that a person brought before the magistrate after an arrest authorized by Article 14.051 of this code was arrested unlawfully, the magistrate shall release the person from custody.<sup>35</sup>

Another relevant statute is Article 42.21(a) of the Code of Criminal Procedure which reads, in pertinent part, as follows:

Before releasing a person convicted of a family violence offense, the entity holding the person shall make a reasonable attempt to give personal notice of the imminent release to the victim of the offense or to another person designated by the victim to receive the notice.<sup>36</sup>

The obvious purpose of this statute is to put notify victims of family-violence offenses that their assailant is about to return to the community. There would be no point in warning family-violence victims that their assailant is moving from jail to prison. To

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<sup>34</sup> See Tex. Code Crim. Proc. Ann. art. 42.09 (West 2006).

<sup>35</sup> Tex. Code Crim. Proc. Ann. art. 15.17(d) (West Supp. 2016).

<sup>36</sup> Tex. Code Crim. Proc. Ann. art. 42.21(a) (West 2006).

interpret the statute to require a jail to notify a family-violence victim when the defendant is being sent to prison would be illogical.

Article 56.11 of the Code of Criminal Procedure is similar. The statute requires TDCJ to inform the victim of certain crimes “whenever a defendant . . . completes the defendant’s sentence and is released” or “escapes from a correctional facility.”<sup>37</sup> The statute is obviously concerned with warning crime victims when the defendant who committed the crime enters back into free society.<sup>38</sup>

In the case at bar, Mr. Williams was never released from custody. This being so, the imposition of the \$5 release fee in his case was improper. The Court of Appeals erred in upholding the imposition of the fee.

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<sup>37</sup> Tex. Code Crim. Proc. Ann. art. 56.11(a) (West 2006).

<sup>38</sup> *See also* Tex. Code Crim. Proc. Ann. art. 62.053(a) (West Supp. 2016) (before person required to register as a sex offender is “due to be released from a penal institution,” TDCJ must “determine the person’s level of risk to the community”); Tex. Code Crim. Proc. Ann. art. 62.056(a) (West 2006) (delineation of public notification requirements when sex offender is “due to be released from a penal institution”).

## SECOND GROUND OF REVIEW

This ground of review assumes that a \$5 cost for releasing a defendant to prison is appropriate. Costs for peace officer services are to be assessed for services performed “in the case.” The Court of Appeals upheld the trial court’s assessment of a \$5 cost even though the sheriff released Mr. Williams to prison following trial. Did the Court of Appeals err in upholding the cost assessment because the release occurred after the trial concluded?

No.

The Court of Appeals acknowledged that its decision upholding the \$5 release fee was at odds with a 2014 Attorney General Opinion. The Court of Appeals discussed this conflict in the following single footnote:

Appellant cites a Texas Attorney General Opinion for the proposition that a court could conclude that any commitment or release from jail after the conclusion of a case is not a service performed “in” the case, and that article 102.011(a)(6) therefore does not authorize a fee for those services. *See* Tex. Att’y Gen. Op. No. GA-1063, at \*5 (2014). Attorney General’s opinions, although persuasive authority, are not binding on the courts of this state. *Holmes v. Morales*, 924 S.W.2d 920, 924 (Tex. 1996); *Cavender v. Hous. Distrib. Co.*, 176 S.W.3d 71, 73 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2004, pet. denied).<sup>39</sup>

There is no question that the opinion of an intermediate court of appeals prevails over an attorney general’s opinion. But most appellate courts, when choosing not to follow the attorney general’s guidance, will explain why the Court believes the attorney general’s opinion is wrong. This did not happen here. The Court of Appeals did not

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<sup>39</sup> *Williams v. State*, 495 S.W.3d at 592, n. 7.

address the attorney general's reasoning. Rather, the Court simply said it did not have to follow the attorney general.

Now, the meaning of the phrase “services performed in the case” is squarely presented to this Court.

The attorney general opinion referenced by the Court of Appeals was initiated by a question from the Office of Court Administration about the release fee. In response, the Attorney General penned the following single paragraph:

Your final question asks about a separate fee imposed under article 102.011(a) of the Code of Criminal Procedure “for services performed in the case by a peace officer,” specifically, “\$5 for commitment or release.” Tex. Code Crim. Proc. Ann. Art. 102.011(a)(6) (West Supp. 2013); Request Letter at 7. You explain that your office understands this language to mean that the fee should be assessed for placing a defendant in jail or releasing a defendant from jail prior to trial. Request Letter at 7. Furthermore, your office does not construe the statute to authorize a fee for release if the defendant is not released from jail prior to trial, nor does your office believe that a fee should be assessed for committing the defendant to jail after the conclusion of the case. *Id.* The express language of article 102.011(a) authorizes fees for services “performed *in* the case. Tex. Code Crim. Proc. Ann. art. 102.011(a) (West Supp. 2013) (emphasis added). A court could therefore conclude that any commitment or release from jail after the conclusion of the case will not be a service performed “in” the case and that article 102.011(a)(6) does not authorize fees for those services.<sup>40</sup>

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<sup>40</sup> Tex. Att’y Gen. Op. No. GA-1063 (2014). As can be seen, the foregoing paragraph also addresses the \$5 commitment fee (commitment fee “should be assessed for placing a defendant in jail”).

The attorney general apparently viewed cases as reaching a conclusion of sorts at the time a defendant is convicted and sentence is pronounced. This is consistent with the idea that a written judgment is to be prepared setting out the details of the case.<sup>41</sup> These details are to include the terms of the sentence.<sup>42</sup>

But in many ways, the case is not over. For example, motions for new trial may be filed<sup>43</sup> as may be motions in arrest of judgment.<sup>44</sup> Also, a *capias pro fine* may be issued. This is an important fact. By definition, a *capias pro fine* may only be issued after that point in time when a defendant is convicted and sentence is pronounced. Article 43.015(2) of the Code of Criminal Procedure defines a *capias pro fine* as follows:

“Capias pro fine” means a writ that is: (A) issued by a court after judgment and sentence for unpaid fines and costs; and (B) directed “To any peace officer of the State of Texas” and commanding the officer to arrest a person convicted of an offense and bring that person before that court immediately.<sup>45</sup>

A fee may be charged for the service of a peace officer in executing or processing a *capias pro fine*. A different portion of Article 102.011 (the statute at issue in this appeal) declares this to be so:

A defendant convicted of a felony or a misdemeanor shall pay the following fees for services performed in the case by

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<sup>41</sup> See Tex. Code Crim. Proc. Ann. art. 42.01 (West Supp. 2016).

<sup>42</sup> See *id.* at Sec. 1

<sup>43</sup> Tex. R. App. P. 21.

<sup>44</sup> Tex. R. App. P. 22.

<sup>45</sup> Tex. Code Crim. Proc. Ann. art. 43.015(2) (West Supp. 2016).

a peace officer: . . . (2) \$50 for executing or processing an issued arrest warrant, *capias*, or *capias pro fine* . . . .<sup>46</sup>

So we have a statute explicitly requiring the assessment of a \$50 fee for the execution or processing of a *capias pro fine*. And a *capias pro fine*, by definition, cannot possibly be issued until after judgment in the case. Thus, the attorney general's statement that peace officers' fees cannot be assessed after judgment because services were not performed "in the case" contravenes our statutes. Services of peace officers performed after judgment are performed "in the case." Fees for those services should be assessed.

The question presented in this ground of review – although raised by Petitioner Justin Williams – should be answered in the negative. Mr. Williams continues to maintain that the Court of Appeals erred in upholding the trial court's assessment of the \$5 fee.<sup>47</sup> But the assessment of the fee is not incorrect on the basis that fees for the services of peace officers cannot be assessed after judgment. A peace officer's service performed after judgment is still a fee performed "in the case." This Court could do much to reduce confusion in the criminal justice system by making this point clear.

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<sup>46</sup> Tex. Code Crim. Proc. Ann. art. 102.011(a)(2) (West Supp. 2016).

<sup>47</sup> See Grounds of Review One and Three.

### THIRD GROUND OF REVIEW

**This ground of review assumes a \$5 cost for releasing a defendant to prison is appropriate even though the release occurs after trial. The Court of Appeals upheld the \$5 cost's assessment even though there had been no release at the time the bill of costs was prepared. Did the court of appeals err in affirming the assessment of a cost for which a service had not yet been performed?**

Yes.

The judgment of conviction in this case is dated October 2, 2015.<sup>48</sup> This is the same day the jury considered Mr. Williams' punishment.<sup>49</sup> Mr. Williams was in court on this day.<sup>50</sup> He had not yet been sent to prison.

The judgment stated that the court costs in the case were "as assessed."<sup>51</sup> The court costs were assessed on a bill of costs that accompanied the judgment.<sup>52</sup> The bill of costs shows an "assessed date" of October 2, 2015<sup>53</sup> and includes a \$5 assessment for "Release."<sup>54</sup> But as of this date, Mr. Williams had not yet been "released" to TDCJ. He was still in the Harris County jail and would not be transferred to TDCJ until over a month later on November 5, 2016.<sup>55</sup> Thus, the bill of costs charges Mr. Williams for a service of peace officers that had not yet been performed. This is a problem. Article

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<sup>48</sup> 1 C.R. at 126.

<sup>49</sup> See 1 C.R. at 106-111, 113-121.

<sup>50</sup> See 7 R.R. at 60.

<sup>51</sup> 1 C.R. at 126.

<sup>52</sup> See 1 C.R. at 128.

<sup>53</sup> 1 C.R. at 128.

<sup>54</sup> 1 C.R. at 128.

<sup>55</sup> 3 C.R. at 104.

103.002 of the Code of Criminal Procedure tells us that “[a]n officer may not impose a cost for a service not performed.”<sup>56</sup>

This does not, however, foreclose assessment of a fee for a peace officer’s service performed after an initial bill of costs is produced. A bill of costs is typically prepared at the time of judgment and reference is often made in the judgment to the bill of costs. But nothing prohibits the preparation of a supplemental bill of costs containing fees assessed for the services of peace officers performed after judgment.

Some fees can only be assessed after judgment because the facts underlying the fee’s assessment can occur only after judgment. One such fee – the fee for a peace officer’s service in connection with a *capias pro fine* – was discussed in Ground of Review Two. Another such fee is the \$25 time payment fee called for by Section 133.103 of the Local Government Code. This fee is assessed when a convicted defendant “pays any part of a fine, court costs, or restitution on or after the 31<sup>st</sup> day after the date on which a judgment is entered assessing the fine, court costs, or restitution.”<sup>57</sup> One appropriate way to assess this \$25 fee is to do so in a supplemental bill of costs prepared after the late payment is made. Alternatively, the fee could be

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<sup>56</sup> Tex. Code Crim. Proc. Ann. art. 103.002 (Tex. 2006).

<sup>57</sup> Tex. Loc. Gov’t Code Ann. § 133.103 (West Supp. 2016).

listed as a conditional fee in the original bill of costs.<sup>58</sup> But the fee should never be charged unconditionally in an original bill of costs.

The same goes for a release fee. Such a fee should never be unconditionally charged in a bill of costs prepared before the release takes place.

Supporting this idea is the language of Article 102.011(a) which requires a defendant to pay for services “performed” in the case.<sup>59</sup> The verb “perform” is written in the past tense on purpose. The statute does not authorize the assessment of costs for services that will (or may) be performed at some later date.<sup>60</sup>

Because the assessment of the \$5 release fee was for a service that had yet to be performed, the assessment was erroneous. The Court of Appeals erred in approving the assessment of the fee. Ground of Review Three should be sustained.

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<sup>58</sup> Such conditional language could say something like “the fee will be assessed if payment is made on or after the 31<sup>st</sup> day after judgment.”

<sup>59</sup> See Tex. Code Crim. Proc. Ann. art. 102.011(a) (West Supp. 2016).

<sup>60</sup> See *id.*

## **PRAYER**

For the reasons stated above, Mr. Williams prays that this Court answer grounds of review one and three affirmatively. Mr. Williams also prays that this Court answer ground of review two negatively. Accordingly, Mr. Williams prays that this Court reverse the Court of Appeals' decision affirming the imposition of the \$5 court cost for release. Further, Mr. Williams prays that this Court order the \$5 court cost for release to be deleted from the bill of costs in this cause.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

Pursuant to Tex. R. App. P. 9.5, I certify that on November 14, 2016, I provided this brief to counsel for the State via the EFILETEXAS.gov e-filing system at the following addresses:

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## CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this brief contains 4,402 words. This word-count is calculated by the Microsoft Word program used to prepare this petition. The word-count does not include those portions of the petition exempted from the word-count requirement under Texas Rule of Appellate Procedure 9.4(i)(1). The number of words permitted for this type of computer-generated petition (a brief in an appellate court) is 15,000. Tex. R. App. P. 9.4(i)(2)(B).

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